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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 05 061 52935 Office: NEBRASKA SERVICE CENTER Date: DEC 18 2006

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

5 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a research associate. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence. Counsel notes that the petitioner's employer previously filed a petition in behalf of the petitioner seeking to classify him as an Outstanding Researcher pursuant to section 203(b)(1)(B) of the Act. As noted by counsel, while the director denied that petition for lack of a permanent job offer, the director did state that the record "appears" to demonstrate that the petitioner is an outstanding researcher. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior findings that may have been erroneous. *See e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that Citizenship and Immigration Services (CIS) or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Thus, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). We will address counsel's more specific assertions and the new evidence below. Ultimately, according to the record, the petitioner's most significant work had only resulted in one publication as of the date of filing and had generated no interest in the field as measured by citations by other researchers, review articles or interest from pharmaceutical companies in licensing or otherwise applying the petitioner's work.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare

> of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of Job Offer.
>
> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in organic chemistry from the University of Missouri-Kansas City (UMKC). The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national

interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, synthesis of polyamine analogues as anticancer and antiparasitic agents, and that the proposed benefits of his work, development of new agents to treat deadly diseases, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner obtained his Master of Science degree in Chemical Engineering in 1993 from Tianjin University. He then worked as a chemical engineer for the Shenyang Research Institute of Chemical Industry through 1997. As stated above, the petitioner obtained his Ph.D. from UMKC in 2001. Since that time the petitioner has worked as a research associate (the grants list him as a postdoctoral researcher) at Wayne State University in Michigan.

Throughout the proceedings, the petitioner has submitted several letters. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also*

Matter of Soffici, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of industry interest and positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

[redacted] a professor at the School of Chemical Engineering at Tianjin University, asserts that the petitioner developed a "new process for the synthesis of Naphthol AS-ITR, which is a key intermediate for production of a number of red pigments and some agrochemical products." While Professor Mu asserts that the petitioner won youth and student awards for this work, included in the record, he does not explain how this work has proven significant. Government recognition for contributions is one of the regulatory criteria for aliens of exceptional ability, a classification that normally requires an alien employment certification. We cannot conclude that meeting one criterion, or even the requisite three criteria for that classification warrants a waiver of that requirement in the national interest. *See generally id.* at 222. Moreover, the petitioner has not explained how this work is relevant to his proposed work.

The record contains no discussion of the significance of the petitioner's work at the Shenyang Research Institute of Chemical Industry.

Dr. [redacted] a professor at UMKC, praises the petitioner's work at that institution but provides few details. Specifically, Dr. [redacted] asserts that the petitioner's publication record as a graduate student is impressive and that the petitioner's contribution "extends much further than the manuscripts written on his research." Dr. [redacted] does not, however, provide supporting details. He asserts that the petitioner has an "extraordinary ability to quickly synthesize compounds and to test their validity," that his work was critical for the success of the projects on which he worked and that his strategies "allowed other potentially important compounds to be targeted." Dr. [redacted] does not, however, identify other projects beyond UMKC that have been impacted by the petitioner's work at that institution.

Dr. [redacted] the petitioner's research advisor at UMKC, provides more details. Dr. [redacted] asserts that the petitioner synthesized a number of aluminum complexes with different ligands, which have great commercial value. While Dr. [redacted] asserts that the petitioner published several papers on this work, he does not identify any industry seeking to license or adopt the petitioner's synthesis methods. Dr. [redacted] further explains that the petitioner synthesized over 50 different symmetric organic compounds, derivatives and intermediates with two-photon absorption (TPA) properties. Such properties have several potential applications, including protection from lasers. Again, Dr. [redacted] asserts that this work has been published but provides no examples of interest in this work in the form of industry interest in

licensing or applying the petitioner's methods or citations of the petitioner's work. Finally, Dr. [redacted] asserts that the petitioner synthesized new uni-molecular initiators for living radical polymerizations. While Dr. [redacted] indicates that this work was the subject of a published article, he does not explain its significance in the field.

Dr. [redacted] the petitioner's supervisor at Wayne State University, asserts that he recruited the petitioner based on his published thesis, which reported the results of his synthesis of two photon-absorbing molecules, bulky aluminum complexes for initiation polymerization and unimolecular initiators for living polymerization. Dr. [redacted] continues that at Wayne State University, the petitioner has "produced remarkable results" and "already made major discoveries concerning the synthesis of polyamine analogues as anticancer and antiparasitic agents." Dr. [redacted] professor at Pace University who characterizes himself as a collaborator of Dr. [redacted] but who is also one of the petitioner's coauthors, explains the significance of these analogues. Polyamines are required for normal cell function in rapidly dividing cells. Synthetic agents, such as polyamine analogues, can disrupt polyamine metabolism and result in target cell death, making them potential anti-cancer agents. As these analogues also inhibit a unique enzyme in parasites, they are also potential treatments for parasitic diseases.

Dr. [redacted] explains that the petitioner "has the required expertise in synthetic and organic chemistry to carry out the design, synthesis and evaluation of analogues, and also has the expertise in biochemistry and possesses strong analytical and interpretive skills to evaluate data and publish results." Dr. [redacted] asserts that the petitioner has successfully developed new strategies for synthesis and that their cytotoxic effects "have also been demonstrated." Dr. [redacted] concedes, however, that only one of the petitioner's articles reporting these results had been published although the petitioner had completed additional manuscripts.

In a second letter, Dr. [redacted] asserts that due to the petitioner's groundbreaking results, he was invited to present his work at the 2004 Polyamine Conference. The record contains an e-mail notice from Dr. [redacted] advising that the program had room for a 20 minute talk by the petitioner; the program for the conference that took place at Pace University and appears to have been sponsored by the university as opposed to a national society; and the abstract for the petitioner's presentation, which lists Dr. [redacted] as a coauthor. The record contains another invitation to speak at Zhengzhou University from [redacted] another of the petitioner's coauthors. These invitations do not establish the petitioner's influence beyond his collaborators.

Dr. [redacted] acknowledges the director's request for evidence of the petitioner's impact in the field and responds as follows:

> As described in the previous letter, the significance of [the petitioner's] contribution to the above fields extends much further than the publications. It is important that you should give high recognition to researchers like [the petitioner] who have been devoted to very basic research that does not give good economic values for the time being. His

> research will provide tremendous fundamental guideline to innovate drug development, and thus his research will affect every life of Americans and the economics of [the] US pharmaceutical company[ies]. That is why our research has been consistently funded by [the] National Institute of Health [(NIH)], which itself proves the significance of [the petitioner's] research. I have no doubt that [the petitioner's] research and knowledge can and will contribute to a number of areas of national interest, including: improving the US economy; improving US health care; and discovery of [a] cure for cancers. He has already made seminal contributions in several areas, ones that will have a major influence on future anti-cancer research. As I explained above, [the petitioner] is one of only a few, if not the only highly qualified scientist in the U.S. that can conduct the type of research in which he has been involved. As such, he not only has had a significant degree of influence, but also is uniquely capable of serving the national interest in anti-cancer related areas of research.

Dr. [redacted] appears to be acknowledging that while the petitioner's contributions are promising; they have yet to influence the field beyond his immediate group of collaborators. As stated above, special or unusual knowledge or training does not inherently meet the national interest threshold. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 221. We generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218.

Dr. [redacted] then lists five contributions the petitioner has made. He does not specify which, if any, were completed and disseminated in the field prior to the date of filing. The petitioner must establish eligibility as of that date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

First, the petitioner designed, synthesized and evaluated alkyl substituted polyamine analogues as antitumor and antiparasitic agents. Dr. [redacted] does not suggest that pharmaceutical companies have expressed an interest in clinical trials of these agents, that they have attracted any attention in review articles or that other research teams have begun applying this work. Second, the petitioner developed new strategies for synthesizing inhibitors for enzymes involved in the polyamine biosynthetic pathway. Dr. [redacted] asserts that such results have not been previously reported and that they open "a new path for other related biological active enzyme inhibitors and drug candidates." Once again, Dr. [redacted] provides no examples of other laboratories pursuing this "path." Moreover, all research must be original to receive funding or be published. Simply demonstrating involvement with original research is insufficient.

Third, the petitioner demonstrated the inhibitory effects of guanidinyl polyamine analogues, which has been confirmed in "further evaluations." Dr. [redacted] does not indicate whether the "further evaluations" were conducted by independent laboratories. We note that this work does not appear to have been published as of the date of filing. As such, it is not clear how this work could have already been influential in the field as of that date.

Fourth, the petitioner synthesized isotope-labeled polyamine analogues and conducted metabolic studies of their action in cells. Dr. [redacted] explains that this work "allowed us to better understand how polyamine functions in cells and provide[d] valuable information for further development of new drug entities." All research, however, must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Dr. [redacted] still fails to provide examples of any interest in this work beyond the petitioner's collaborators. Finally, the petitioner proposed a strategy of targeted prostate cancer treatment. Dr. [redacted] does not assert that this project had yielded any significant results as of the date of filing.

Dr. [redacted] a professor of oncology at Johns Hopkins University and the subcontractor principal investigator of the petitioner's current project, asserts that the petitioner is pursuing a novel line of research and that its importance is apparent from the NIH funding it receives. It can be argued, however, that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

The petitioner also provided letters from Dr. [redacted] a professor at the University of Alabama at Birmingham who knows the petitioner through frequent communication with Dr. [redacted] Dr. [redacted] group leader at Lexicon Pharmaceuticals who indicates that he knows of the petitioner "through his C.V. and publications," and Dr. [redacted] a professor at the Nanotechnology Characterization Laboratory (NCL), who does not explain how he learned of the petitioner's work. Neither the professors nor Dr. [redacted] claims to have applied the petitioner's work. Significantly, although several references assert that the petitioner's work relates to drug development, Dr. [redacted] does not assert that Lexicon Pharmaceuticals is interested in pursuing polyamine analogues as anti-cancer or antiparasite agents.

On appeal, the petitioner submits two additional letters. Dr. [redacted] a senior staff fellow at the U.S. Food and Drug Administration (FDA), indicates he has over 20 years of experience in pharmaceuticals. Dr. [redacted] indicates that he knows the petitioner through his presentations and publications. He praises the petitioner work on aluminum complexes, but does not explain how he has expertise in research with no pharmaceutical basis. Dr. [redacted] also praises the petitioner's work on polyamine analogues. Dr. [redacted] asserts that the petitioner "challenged conventional thinking" and that his "pioneering work on potential drug target[s] will pave the way to fight cancer and its related problems." Dr. [redacted] does not, however, indicate that the FDA has commissioned any trials of polyamine analogues or is otherwise evaluating them.

[redacted] a senior scientist at [redacted], asserts that the petitioner is one of the best synthetic chemists and that his synthesized analogues "showed very promising results" in vitro and in vivo. While Mr. [redacted] indicates that further investigation is in progress and that some compounds "are to be

patented," he does not indicate that [redacted] has expressed any interest in collaborating on clinical trials or licensing the petitioner's compounds.

The above letters credit the petitioner with novel syntheses and patent pending innovations. We note, however, that the grant application submitted in response to the director's request for additional evidence reflects that Dr. [redacted] Dr. [redacted] and another individual filed a provisional patent application for "Polyamine Analogues with Significant Antitumor and Antiparasitic Activity" in August 2003. The petitioner is not named on the patent in the grant application. The petitioner has not submitted any patent applications that do list him as one of the inventors.

Beyond the letters submitted, the petitioner submitted evidence that he had authored nine published articles and that one of the articles had been cited twice as of the date of filing. Subsequently, the petitioner submitted evidence that one of his articles had been cited once and another article had been cited three times. It can be expected that major breakthroughs in anticancer agents, as the petitioner's work is characterized by the petitioner's references, would receive more attention in the scientific literature.

The petitioner also submitted evidence of his membership in the American Chemical Society (ACS), which has 159,000 members "at all degree levels," the American Association of Pharmaceutical Scientists (AAP), which has no set of membership requirements and the honor society Sigma Xi of Wayne State University. The materials about Sigma Xi submitted reveal that Sigma Xi invites to full membership "those who have demonstrated noteworthy achievements in research." These achievements must be evidenced by "publications, patents, written reports or a thesis or dissertation, which must be available to the Committee on Admission if requested." [redacted] Executive Director of Sigma Xi, indicates that a noteworthy achievement is interpreted as primary authorship of **two papers. In addition, an earned doctoral degree may be substituted for one paper.** While noteworthy, the membership is not evidence of recognition beyond Wayne State University, which nominated and elected the petitioner to membership. Moreover, professional memberships are simply one of the regulatory criteria for aliens of exceptional ability, a classification that normally requires an alien employment certification. As stated above, meeting one, two or even the requisite three criteria for that classification cannot warrant a waiver of the alien employment certification in the national interest.

On appeal, counsel asserts that the requests for the petitioner to review manuscripts for various publications sets him apart from others in the field. All of the review requests, however, are dated after the petition was filed. Thus, they cannot be considered evidence of the petitioner's eligibility as of that date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. at 49. Moreover, any evidence that the petitioner has reviewed manuscripts must be considered in the context of the petitioner's field. We cannot ignore that scientific journals are peer reviewed and rely on many scientists to review submitted articles.

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. It can be argued, however, that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. In order to demonstrate an influence in the field, it can be expected that the results would have already been published and reproduced and confirmed by other experts. Otherwise, it is difficult to gauge the impact of the petitioner's work.

As discussed above, the petitioner's independent references do not claim to be influenced by the petitioner's work. While the record includes numerous attestations of the potential impact of the petitioner's work, none of the petitioner's references provide examples of how the petitioner's work is already influencing the field. It can be expected that an anticancer or antiparasitic agent as promising as claimed in the record would have generated some response in the scientific media, either through citations by other research teams or in review articles. While the evidence demonstrates that the petitioner is a talented researcher with potential, it falls short of establishing that the petitioner has already influenced the field. In fact, he had only published one article on anti-cancer agents as of the date of filing and there is no evidence that article has prompted additional research in that area or generated interest in any pharmaceutical company to license or otherwise apply the petitioner's compounds.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. **The petitioner has not sustained that burden.**

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.